Case No. 17-1994

In the

United States Court of Appeals

for the

Federal Circuit

MODA HEALTH PLAN, INC.,

Plaintiff-Appellee

v.

UNITED STATES,

Defendant-Appellant

Appeal from the United States Court of Federal Claims,
Case No. 1:16-cv-00649-TCW · Honorable Thomas C. Wheeler

BRIEF OF *AMICUS CURIAE* HEALTH REPUBLIC INSURANCE COMPANY IN SUPPORT OF PLAINTIFF-APPELLEE

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CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4, counsel for *amicus curiae* Health Republic Insurance Company certifies the following:

1. The full name of every party or *amicus* represented by one or more of the undersigned counsel is:

   Health Republic Insurance Company.

2. The name of the real party in interest (if the party in the caption is not the real party in interest) represented by one or more of the undersigned counsel is:

   Not applicable.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or *amicus* represented by one or more of the undersigned counsel are:

   None.

4. The names of all law firms and the partners or associates that appeared for the party or *amicus* now represented by one or more of the undersigned counsel in the trial court or agency or are expected to appear in this court are:

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August 28, 2017

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INTEREST OF AMICUS CURIAE[1]

Health Republic Insurance Company ("Health Republic") is a nonprofit corporation organized under the laws of the State of Oregon that began providing health insurance to thousands of people on Oregon's state-based health exchange, established pursuant to the ACA, in January 2014. Health Republic provided health insurance to its insureds until October 2015, when it learned the Government would make only a fraction of the payments owed to Health Republic under the what is known as the ACA's "risk corridors program." Due to this shortfall, Health Republic was forced to wind down its operations and did not offer any health insurance in 2016.

Shortly after it was forced into this difficult decision, Health Republic filed the first lawsuit in the nation related to the failure of the United States of America (the "Government") to make full payments under the risk corridor program of the Patient Protection and

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), counsel for *amicus* Health Republic Insurance Company represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(2), all parties have consented to the filing of this brief.

Affordable Care Act ("ACA"). Health Republic did so on behalf of both itself and a putative class of qualified health plan issuers for the 2014 and 2015 benefit years (the "QHP Issuer Class"). The Court certified the QHP Issuer Class and Health Republic acts as its representative. The class action asserts a Tucker Act claim for failure to make full risk corridor payments—a claim that is virtually identical to the one Moda Health Plan, Inc. asserts here. Accordingly, Health Republic's interest in this case is based on the fact that its interests, as well as the interests of the QHP Issuer Class it represents, may be affected by the outcome of this appeal. Indeed, the class action has been stayed pending the Federal Circuit's decision in this case and the *Land of Lincoln* appeal. On behalf of itself and the certified class, Health Republic respectfully submits this brief in support of affirming the judgment in this action in favor of Moda Health Plan, Inc.

INTRODUCTION

Appellee Moda Health Plan, Inc.'s ("Moda's") opposition brief handily explains why the lower court properly held that the Government "unlawfully withheld risk corridors payments from Moda, and is therefore liable." Although Health Republic believes this Court should affirm the lower court's ruling in full for the reasons Moda explained, it nevertheless also believes that certain issues from Appellant's opening brief bear additional discussion and explanation.

First, the Government incorrectly attempts to conflate (1) statutory obligations to pay with (2) "obligations" under appropriations law. These are separate concepts. The latter is a term of art specific to the logistics for an agency's payment of appropriated funds. The former is simply a requirement to pay that the Government set for itself. Appropriation "obligations" have no bearing on whether the Government violates its legal promises to pay private plaintiffs and thus gives rise to Tucker Act jurisdiction. Nor—as ample precedent demonstrates—can the Government avoid liability under the Tucker Act by underfunding or failing to appropriate funds required by a money-mandating statute.

Second, the Government heavily relies on four cases that, by their critical differences from this case, show why the Government's argument that underfunding a monetary obligation obviates that obligation must fail. Those cases are *Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States*, *United States v. Dickerson*, *United States v. Will*, and *United States v. Mitchell*. None compels the result the Government urges on this appeal; indeed, quite the opposite.

ARGUMENT

A. The Government Improperly Attempts to Confuse Obligations to Pay With "Obligations" Under Appropriations Law

1. A statute is either money-mandating or not, regardless of whether it also includes an appropriation in its text

Whether or not a statute is money-mandating depends only on whether it is "reasonably amenable to the reading that it mandates a right of recovery in damages." *See United States v. White Mountain Apache Tribe*, 537 U.S. 465, 473 (2003); *see also United States v. Mitchell*, 463 U.S. 206, 219 (1983) (courts must "examine whether [sources of substantive law] can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties they impose"). A plaintiff must therefore allege and establish

"that the particular provision of law relied upon grants the claimant, expressly or by implication, a right to be paid a certain sum." *Health Republic Ins. Co. v. United States*, 129 Fed. Cl. 757, 770 (2017) (quoting *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967)). "[A] statute is money mandating when the government has an absolute duty to make payments to any person who meets the specific requirements set forth in the statute." *ARRA Energy Co. I v. United States*, 97 Fed. Cl. 12, 19 (2011) (citing *Grav v. United States*, 886 F.2d 1305, 1307 (Fed. Cir. 1989)).

Statutes that state the Government "will pay" or "shall pay" certain amounts are money-mandating. *Health Republic*, 129 Fed. Cl. at 770; *see also Greenlee Cnty., Ariz. v. United States*, 487 F.3d 871, 877 (Fed. Cir. 2007) ("*Greenlee II*") (holding that statutory provisions are generally money-mandating if they provide that the Government "shall" pay an amount of money); *Britell v. United States*, 372 F.3d 1370, 1378 (Fed. Cir. 2004) ("[T]his type of mandatory language, e.g., 'will pay' or 'shall pay,' creates the necessary 'money-mandate' for Tucker Act purposes.") (citation omitted); *Agwiak v. United States*, 347 F.3d 1375, 1380 (Fed. Cir. 2003) ("We have repeatedly recognized that the use of

the word 'shall' generally makes a statute money-mandating.") (citations omitted).

In its brief, the Government tries to confuse this law by conflating the concept of a statutory obligation to pay arising from a money-mandating statute with an appropriation "obligation." *See*, *e.g.*, Brief for Appellant ("Gov. Br.") at 29-30 (arguing that Section 1342 does not include "the language of 'obligation'" addressed in a case, *Prairie County*, about an agency's use of appropriated funds). As the Government Accountability Office ("GAO") has explained, the latter is a term of art "central [and specific] to appropriations law" and references the amount of money an agency is able to legally obligate from a preexisting appropriation. *See* GAO, *Principles of Fed. Appropriations Law* (Ch. 7), at 7-3—7-4 (3rd ed. 2006).[2] Obligations are one of the two ways an agency may "use" an appropriation (the other being a direct expenditure). *Id.* at 7-2. An agency may not obligate amounts it has

[2] The GAO's opinions, such as those in GAO's *Principles of Fed. Appropriations Law* (the "*GAO Red Book*"), are non-binding, but highly persuasive, authority on federal appropriations law. *See*, *e.g.*, *Nevada v. Dep't of Energy*, 400 F.3d 9, 16 (D.C. Cir. 2005). The *GAO Red Book* is being updated on a chapter-by-chapter basis, and Health Republic's citations to the *GAO Red Book* specifically reference the controlling edition of each cited chapter.

not been appropriated, because to do so would violate the Anti-Deficiency Act, 31 U.S.C. § 1341, which, among other things, prohibits agencies from "obligating" or committing to pay amounts in excess of appropriations. *Id.* (Ch. 6), at 6-36—6-37.

But an agency's "obligation" of an appropriation should not be confused with Congress' own commitment to pay specific amounts, which may arise from two other forms of legislation besides an appropriations act: (1) "organic" (or "enabling") legislation; and (2) "appropriation authorization" legislation. The former establishes, *inter alia*, federal programs and the latter establishes amounts that may or will be paid out under such programs. But neither typically includes budget authority or an appropriation as part of the legislation. *GAO Red Book* (Ch. 2), at 2-54 (4th ed. 2016); *see also id.* at 2-55 ("[P]rovisions conferring budget authority and authority to make payments to liquidate obligations nearly always appear in appropriations acts, ***not in organic legislation or in appropriation authorization legislation***.") (emphasis added).

Whether a piece of organic or appropriation authorization legislation contains an appropriation is thus completely irrelevant to

whether the legislation requires the Government to make monetary payments; *i.e.*, is money-mandating. *See*, *e.g.*, *Agwiak*, 347 F.3d at 1380 (concluding statute was money-mandating without regard to whether it was supported by a corresponding appropriation). If the legislation is money-mandating, failure to appropriate sufficient funds to meet payment obligations established in the legislation gives rise to the right to recover by lawsuit. *GAO Red Book* (Ch. 2), at 2-63 (4th ed. 2016) (collecting citations). This Court and the Court of Federal Claims have been consistent and clear on this point. *See*, *e.g.*, *Slattery v. United States*, 635 F.3d 1298, 1320 (Fed. Cir. 2011) (holding that "the source of funding of an agency's activities or for payment of its judgments is not a limitation on Tucker Act jurisdiction"); *Wetsel-Oviatt Lumber Co., Inc. v. United States*, 38 Fed. Cl. 563, 570-571 (1997) (finding that "[i]nsufficient appropriations" do "not pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties") (citation omitted).[3]

[3] Another critical point is that the Anti-Deficiency Act does not impose limitations on or otherwise restrict money-mandating obligations; it only restricts agencies' abilities to make payments. *Compare* Gov. Br. at 25-26 (invoking the Anti-Deficiency Act); *with* (*footnote continued*)

Further, the Government claims incorrectly that a money-mandating statute must also have a corresponding appropriation in order for the obligation to be enforceable. Gov. Br. at 21-33. But this Court has directly rejected the Government's argument: "It has long been established that the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute." *Greenlee II*, 487 F.3d at 877 (quoting *N.Y. Airways, Inc. v. United States*, 369 F.2d 743, 748 (Ct. Cl. 1966)). Indeed, the cases the Government relies upon stand only for the

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Greenlee II, 487 F.3d at 877 ("Rather than limiting the government's obligation, a 'failure [of Congress] to appropriate funds to meet statutory obligations prevents the accounting officers of the Government from making disbursements, but such rights [remain] enforceable in the Court of Claims.'") (quoting *N.Y. Airways v. United States*, 369 F.2d 743, 748 (Ct. Cl. 1966)); *see also Wetsel-Oviatt*, 38 Fed. Cl. at 571 (noting the failure to appropriate sufficient funds to meet statutory obligations "merely impose[s] limitations upon the Government's own agents," but does not eliminate the Government's obligation to pay) (citations omitted). For this reason, to the extent HHS publicly stated it would make full risk corridor payments "subject to the availability of appropriations," *see* Gov. Br. at 44 n.11, that was simply a recognition of the limits placed on it by the Anti-Deficiency Act. The more important aspect of HHS's statements is that it consistently maintained it owed QHP issuers full risk corridor amounts. *See* Brief for Appellee ("Moda Br.") at 14-17 (collecting HHS statements).

proposition that if an otherwise money-mandating statute has *additional* language explicitly making payment contingent on available appropriations, then the Government's obligation to pay is limited to those appropriations. *See*, *e.g.*, *Prairie Cnty., Mont. v. United States*, 782 F.3d 685, 690 (Fed. Cir. 2015) (holding Government's obligations were limited by provision stating "[a]mounts are available *only as provided in appropriation laws*") (emphasis added); *Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States*, 48 F.3d 1166, 1168 (Fed. Cir. 1995) (stating that relevant "statute recognizes that Congress may choose to appropriate less money for entitlements under the Act than is required to fund those entitlements fully"). [4] No such statutory limitation exists in the risk corridor program. *See* 42 U.S.C. § 18062.

In arguing that money-mandating statutes must have accompanying appropriations, the Government most prominently relies on *Prairie Cnty., Mont. v. United States*, 113 Fed. Cl. 194 (2013) (Sweeney, J.) ("*Prairie Cnty. I*"), *aff'd*, 782 F.3d 685 (Fed. Cir. 2015) ("*Prairie Cnty. II*"), *cert. denied*, 136 S. Ct. 319 (2015). As discussed,

[4] The statute at issue in *Highland Falls* was not money-mandating. However, this Court assessed the Tucker Act claim notwithstanding that fact. *See* Argument Section B., *infra*.

however, *Prairie County* simply demonstrates that, in assessing a Tucker Act claim, it is important to determine what limits, if any, Congress placed on a statutory program. In that case, the statute in question (PILT) stated, "Necessary amounts may be appropriated to the Secretary of the Interior to carry out this chapter. ***Amounts are available only as provided in appropriation laws***." *Prairie Cnty. I*, 113 Fed. Cl. at 197 (emphasis added). The highlighted language "limit[ed the Government's] contractual authority to the amount appropriated by Congress." *Id.* at 199-200 (citing *Greenlee II*, which interpreted the same statute). *Prairie County I* was thus a statutory language-driven decision based on a limitation that has no analogue in Section 1342 or its implementing regulations. *Compare Prairie Cnty. I*, 113 Fed. Cl. at 197 (quoting version of 31 U.S.C. § 6906 in place at the times relevant to the lawsuit); *with* 42 U.S.C. § 18062; 45 C.F.R. § 153.510. The case is therefore inapposite.

2. The Tucker Act provides legal relief if Congress fails to appropriate sufficient funds to satisfy a money-mandating statute

Throughout its brief, the Government argues that "Congress controls the power of the purse" and that no money may be paid from

the Federal Treasury without authorization from Congress. *See*, *e.g.*, Gov. Br. at 2. That is true. But it is also overly simplistic, particularly because it ignores the Tucker Act and the difference between the Government's monetary liability and its payment of that liability.

As Judge Sweeney of the Court of Federal Claims noted in an order denying the Government's motion to dismiss Health Republic's claim—which is virtually identical to Moda's statutory claim here—the Tucker Act long ago "waive[d] sovereign immunity for claims against the United States that are founded upon the Constitution, a federal statute or regulation, or an express or implied contract with the United States." *Health Republic*, 129 Fed. Cl. at 770 (citing 28 U.S.C. § 1491(a)(1)). To be sure, the Tucker Act is "merely a jurisdictional statute" and "does not create any substantive right enforceable against the United States for money damages." *Id.* (citation omitted). But if a plaintiff establishes a substantive right to money damages due to, *inter alia*, a "money-mandating constitutional provision, statute or regulation," the Tucker Act allows them to obtain a money judgment against the Government from this Court. *Id.*

The crucial distinction the Government misses is that the Court of Federal Claims's ability to issue a judgment is not contingent on the plaintiff's ability to obtain payment from the Federal Treasury. As this Court held *en banc*, the Court of Federal Claims's ability to determine the Government's monetary liability has nothing to do with whether Congress appropriated money to satisfy that liability. *Slattery*, 635 F.3d at 1320-1321 ("[T]he source of funding of an agency's activities or for payment of its judgments is not a limitation on Tucker Act jurisdiction."). The only pertinent questions are whether there exists a substantive right to payment (*e.g.*, via a money-mandating statute) and whether the plaintiff falls into the category of entities that may invoke that right. *Greenlee II*, 487 F.3d at 876.

B. The Government's Reliance on *Highland Falls*, *Dickerson*, *Will*, and *Mitchell* to Justify Non-Payment is Misplaced

Highland Falls. The Government claims (at 24) that *Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States*, 48 F.3d 1166 (Fed. Cir. 1995) is "particularly instructive" here. *Highland Falls*, however, is inapposite and offers no support for the Government's position. Notably, *Highland Falls* does not deal with a money-

mandating statute. 48 F.3d at 1169 (noting the lower court concluded that "the Impact Aid program ***is not a mandatory spending program***") (emphasis added). Rather, the statute at issue in *Highland Falls*, the Impact Aid Act, entitled local educational agencies in counties where the federal government owned land to receive amounts the Secretary of the Department of Education determined, ***in its discretion***, equaled the financial burden imposed by the government's land ownership (and corresponding lack of tax revenues). *Id.* at 1168 (citing 20 U.S.C. § 237(a)). The statute did not unequivocally state the Government "shall" or "will" pay certain amounts. This immediately distinguishes and renders *Highland Falls* inapposite to the current case, where there is clearly a money-mandating statute at issue. *Health Republic*, 129 Fed. Cl. at 770.

Nevertheless, the Government cites *Highland Falls* for the proposition that the opinion shows Congress may repeal a payment obligation simply by underfunding that obligation. That argument, however, substantially misunderstands *Highland Falls*.

Unlike Section 1342 and its implementing regulations, the Impact Aid Act ***specifically allowed Congress to appropriate less funds***

than necessary in full satisfaction of the Act's entitlements. 48 F.3d at 1168 (discussing 20 U.S.C. § 240(c)). Specifically, Section 240(c) of the statute stated that, if Congress did not appropriate enough to fund the full scope of Impact Aid programs, then the Secretary was to allocate that lump-sum appropriation in specific ways, including by allocating enough of the appropriation to fund 100% of entitlements under § 237 of the act. *Id.* [5] From 1989-1993, instead of making lump-sum appropriations, Congress provided earmarked appropriations identifying specific amounts it appropriated to each Impact Aid program. The amounts Congress allocated for the § 237 program proved insufficient to satisfy all entitlements under that Section in those years, which meant the plaintiff received less than § 237 technically provided. The plaintiff demanded full payment from DOE, but under the argument that DOE should have allocated more funds from the other Impact Aid programs. *Id.* at 1170. DOE refused because it concluded that Congress' earmarked appropriations overrode § 240(c)'s allocation formula. *Id.* at 1169.

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[5] The act also created entitlements under two other sections: §§ 238 and 239. *Highland Falls*, 48 F.3d at 1168.

At issue, then, was ***not*** whether the Government could underfund the program. Instead, the dispute centered around whether DOE erred by not "borrowing" funds from other Impact Aid programs pursuant to § 240(c) in order to make full payments under § 237.

As noted above, the Court first found that the Impact Aid Act was not money-mandating. *Id.* at 1168. Thus to the extent the Court entertained the allocation issue at all, it was only for the sake of argument. *Id.* at 1170. In drawing that argument to its conclusion, this Court held that the earmarks did supersede § 240(c) because they identified specific amounts Congress intended for the entitlements. *Id.* at 1170-1171. Put differently, Section 240(c) was a default allocation method for the Secretary in case Congress did not give the agency enough money to pay the Impact Aid entitlements (as Congress allowed itself to do by statute). By earmarking specific amounts to specific programs, Congress took the allocation decisions out of the Secretary's hands, thus explicitly overriding § 240(c) in those specific years. *Id.*

The differences between *Highland Falls* and this case show why the Government's repeal by implication arguments must fail. First, there is a money-mandating statute here and there was none in

Highland Falls. Second, the statute in *Highland Falls* specifically permitted Congress to underfund the Impact Aid program. There is no similar provision for the risk corridors program anywhere in Section 1342 or the ACA, meaning the decision to underfund the risk corridors program gives rise to liability on the statute's face. *See Greenlee II*, 487 F.3d at 877; *N.Y. Airways*, 369 F.2d at 748; *Wetsel-Oviatt*, 38 Fed. Cl. at 571. Third, the appropriations acts at issue in *Highland Falls* clearly set a cap on ***all*** payments for the Impact Aid program. *See Star-Glo Assocs. LP v. United States*, 414 F.3d 1349, 1355 (Fed. Cir. 2005) (noting that the *Highland Falls* Court found that the specific statutory language within the context of the Impact Aid program "impose[d] a cap"). The Spending Bills here simply state they do not make certain funds out of certain accounts available to HHS for payment of risk corridor amounts. Both pre- and post-*Highland Falls* precedent makes clear such an action does not obviate the Government's payment obligations. *See* Argument Section A., *supra*.

Dickerson, Will, and Mitchell. The Government also cites *United States v. Dickerson*, 310 U.S. 554 (1940), *United States v. Will*, 449 U.S. 200 (1980), and *United States v. Mitchell*, 109 U.S. 146 (1883),

as examples of instances where an appropriations law amended a preexisting statutory obligation. Gov. Br. at 24. However, in each of these cases, the appropriations acts in question went far beyond the mere limitation found in the Spending Bills here.

For example, in *Dickerson*, Congress stated in a subsequent appropriation that the preexisting statutory obligation "is hereby ***suspended***," "no part of ***any appropriation*** contained in this or ***any other Act*** for the fiscal year . . . shall be available for the payment . . . ***notwithstanding the applicable provisions of***" the statute. *Dickerson*, 310 U.S. at 555-57 (emphasis added). Similarly, in *Will*, the appropriation stated that "[n]o part of the funds appropriated in this Act ***or any other Act*** shall be used" to meet the statutory obligation; the preexisting statutory obligation that "***shall not take effect***"; "[n]o part of the funds appropriated for the fiscal year ending September 30, 1979, by this Act ***or any other Act*** may be used to pay" the statutory obligation; and "funds available for payment . . . shall not be used to" meet the statutory obligation. *Will*, 449 U.S. at 205-08 (emphasis added). Finally, in *Mitchell*, the underlying statutory obligation to pay and limitation were both contained in appropriations acts, and both

involved the special case of Indian appropriations. The Court held that Congress's "purpose" in the subsequent appropriations act was "to suspend the law." *Mitchell*, 109 U.S. at 150.

Dickerson, *Will*, and *Mitchell* are notable primarily because the language that repealed the prior statutory obligation finds no analog in Section 1342, the ACA, or the subsequent Spending Bills. And, as Judge Wheeler noted in the opinion underlying this appeal, Congress demonstrated it was fully capable of employing repealing language such as that used in these cases, because it employed virtually identical repealing limitations as in *Dickerson* and *Will*—just on other parts of the ACA than the risk corridors program—when it enacted the Spending Bills. *See Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436, 461 (2017).

CONCLUSION

For all these reasons and those set forth in Moda Health Plan, Inc.'s brief, the Court should affirm the judgment.

Dated: August 28, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(a), the undersigned certifies that this brief complies with the applicable type-volume limitations. Exclusive of the portions exempted by Federal Rule of Appellate Procedure 29(d) and 32(f), this brief contains 3759 words. This certificate was prepared in reliance on the word count of the word-processing system used to prepare this brief.

The undersigned further certifies that this brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2014 in 14-point Century Schoolbook font.

Dated: August 28, 2017

/s/ *Stephen A. Swedlow*
Stephen A. Swedlow

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2017:

1. I presented the Brief Of Amicus Curiae Health Republic Insurance Company In Support Of Plaintiff-Appellee to the Clerk of the Court for filing and uploading to the CM/ECF system, which will send notification of such filing to all counsel of record, which constitutes service pursuant to Fed. R. App. P. 25(c)(2), Fed. Cir. R. 25(a), and the Court's Administrative Order regarding Electronic Case Filing 6(A).

/s/ *Stephen A. Swedlow*
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